



# RIGHTS STUFF

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## Supreme Court Sides With Walmart

In a closely-watched case, the U.S. Supreme Court in June decided that nearly 1.5 million women could not join together in a class action sex discrimination lawsuit against Walmart.

Walmart is the largest private employer in the country, with stores throughout the country. At each store, the local manager exercises broad discretion as far as hiring and pay.

Three women sued Walmart and sought to represent a much larger class of women whom they contended had been subjected to sex discrimination on the part of the company.

Betty Dukes began as a cashier for the store. She was promoted to customer service manager but then demoted back to cashier and then to greeter for disciplinary violations. She said the disciplinary actions against her were really retaliation for having invoked internal complaint procedures and that men were not disciplined for similar infractions.

Christine Kwapnoski had a number of different jobs at Walmart, including supervisory jobs. She said that a male manager yelled at her and other women frequently, but did not yell at men. She said he told her to "doll up" and to

"wear some makeup, and to dress a little better."

Edith Arana said that when she approached her manager about management training, she was brushed off. She filed an internal complaint but was told that if she thought her immediate manager was being unfair, she should contact the district manager. She did not. Nor did she pursue management training. Each of these women worked at different stores.

Justice Scalia, writing for the majority, said that the plaintiffs' position was that "local managers' discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees . . . the basic theory of their case is that a strong and uniform 'corporate culture' permits bias against women to infect, perhaps subconsciously, the discretionary decision-making of each one of Walmart's thousands of managers - thereby making every woman at the company the victim of one common discriminatory practice."

Justice Scalia said that the 1.5 million women did not have the "commonality" required to be certified as a class. There was no common pattern or practice

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## Who Is A Man?

El'jai Devoureau was born physically a woman but says he has identified himself as a man his entire life. In 2006, he began taking male hormones and had sex change surgery. His birth certificate now identifies him as male, as do his New Jersey driver's license and Social Security records.

In June of 2010, he was hired by Urban Treatment Associates in Camden to be a part-time urine monitor. His job was to make sure that people recovering from addiction did not substitute someone else's urine for their own during drug testing. On Devoureau's second day of the job, his supervisor said she had heard he was transgender. He told her he was a man. She

asked him if he had undergone gender reassignment surgeries. He told her that was private and he shouldn't have to answer that question. She fired him.

He filed a complaint with the New Jersey Division on Civil Rights. Urban Treatment Associates said that this was one of the rare cases that sex is a bona fide occupational qualification and that they needed a man to do this particular and unique job. The case is now in court.

The urine monitor job paid \$10 an hour and was part-time. Mr. Devoureau said he wanted the job back because he really needed the additional income to

support himself and his son.

He said he values his privacy and does not want to disclose precisely what changes he has made to his body and what operations he has had, but he knows he may need to as part of the lawsuit. "They were judging me for who I am, not for the job I was being asked to do, and that's wrong, and I was hurt. I'm doing this [suing] so everyone knows it's wrong, so it doesn't happen to anyone else," said Devoureau.

(Based on "In New Jersey, a Job Discrimination Lawsuit's Unusual Question: Who is A Man?" by Richard Perez-Pena, New York Times, April 11, 2011, page A18.) ♦

## Walmart (continued from page 1)

of discrimination that the women shared. He wrote "here respondents wish to sue about literally millions of employment decisions at once." He wrote that significant proof that Walmart operated under a general policy of discrimination was "entirely absent here." The only evidence the women presented of a general policy of discrimination was a study by a sociologist, who said that the company had a "strong corporate culture" that made it "vulnerable" to "gender bias." But the expert could not say whether that bias affected 0.5 percent or 95 percent of employment decisions at Walmart.

The women argued that Wal-

mart's policy of allowing discretion by local supervisors was evidence of sex discrimination. Justice Scalia wrote in response to this argument, "to the contrary, left to their own devices, most managers in any corporation - and surely most managers in a corporation that forbids sex discrimination - would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all."

All nine justices agreed that the class action should not have been certified because of the type of monetary relief that the women sought. But four justices, including the three women justices, disagreed with

much of what Justice Scalia wrote. Justice Ginsberg, writing the dissent, noted that one factor considered when making promotion decisions is the applicant's willingness to relocate, a policy that could be more detrimental to women than to men. She also noted that women fill 70% of the hourly jobs at Walmart but only 33% of the management jobs, that Walmart pays women less than men in every region of the country and that "the salary gap widens over time even for men and women hired into the same jobs at the same time."

The case is Walmart Stores v. Betty Dukes et al., 2011 WL 2437013 (U.S. 2011). ♦



## Seventh-day Adventist Member Loses Suit To Get Saturdays Off

Hosea Harrell is a member of the Seventh-Day Adventist Church and a former letter carrier who delivered mail for the Warrensburg, Missouri Post Office. This post office employed seven full-time letter carriers, one full-time letter carrier technician and three part-time flexible letter carriers. They needed at least seven letter carriers working each day to complete the routes.

Under their seniority system, the six most junior full-time letter carriers had rotating schedules, working five days a week, with Sunday and one other day off. Each of these six carriers got one Saturday out of six off. Only the most senior full-time carrier always got Saturdays off.

Harrell began working for USPS in 2001 as a part-time flexible letter carrier. He became a full-time letter carrier in 2004, working on a rotating schedule. He was the most junior full-time carrier from the time he got the job until he was fired.

In November of 2006, Harrell asked his supervisor if he could have every Saturday off as an accommodation for his religious beliefs. His supervisor offered to

allow him to take off part of each Saturday to attend church, but he rejected that offer. His supervisor asked the other carriers if they were willing to give up any of their Saturdays off to accommodate another letter carrier. They refused.

The supervisor told Harrell he could attempt to swap days off with other carriers, or he could make a lateral transfer to another office. He refused, saying that the only accommodation he was willing to consider was to be given every Saturday off.

In the summer of 2007, Harrell began to request leave for numerous Saturdays. Nearly all of his requests were denied. In October, he stopped working on Saturdays, even though his request for leave on those days was denied. He was charged with being absent without leave, and after three disciplinary suspensions, the post office fired him. He sued, alleging religious discrimination in employment. He lost.

The Trial Court found that the post office had given a legitimate, non-discriminatory reason for the discipline and termination - Harrell had repeatedly failed to

work when scheduled. The Trial Court also said that it would have been an undue hardship for the post office, with its small work force, to provide him with the accommodation he wanted. And the Trial Court found that he did not have the right to sue under the federal Religious Freedom Restoration Act of 1993. He appealed, but the Court of Appeals agreed with the Trial Court.

The Court of Appeals said that employers do not have to violate contracts negotiated with unions or established seniority systems to accommodate employee's request for time off for religious reasons. As the Court said, "it would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others."

The Court also said that Title VII of the Civil Rights Act of 1964 is the exclusive remedy for claims of discrimination in federal employment, and thus Harrell could not sue under the Religious Freedom Restoration Act.

The case is Harrell v. Donahue, 638 F. 3d 975 (8th Cir. 2011). ♦



## **PALS Provides Resource For People With Disabilities**

People and Animal Learning Services (PALS) is an equine assisted program that provides therapeutic riding lessons to children and adults with disabilities and to at-risk youth. PALS provides service to individuals with a large range of cognitive and physical disabilities. Since 2000, PALS has provided more than 13,900 high-quality equine assisted lessons, improving the lives of hundreds of children and adults in our community. In 2011, PALS will provide more than 1,800 lessons to more than 150 riders. The benefits of equine assisted activities are wide spread, and include decreasing

muscle spasms, increasing muscle strength/balance and increasing self-esteem. PALS focuses on abilities rather than disabilities, and treats all of its riders as individuals. PALS is a NARHA Premier Accredited Equine Assisted Activities program, and the only Premier Accredited Center in the Bloomington area. It is also a United Way member agency. For information about riding lessons, please contact [jenn@palstherapy.org](mailto:jenn@palstherapy.org) or call 812-336-2798 x 2. Visit [www.palstherapy.org](http://www.palstherapy.org) for more details. ♦



**Members and friends of the Bloomington and Monroe County Human Rights Commissions distributed 2000 diversity books to children during the 2011 Fourth of July parade.**